Supreme Court, U.S.
FILED
OCT 15 '02
OFFICE OF THE CLERK

No. 02-223

In The

Supreme Court of the United States

KENNETH ANGARONE AND THOMAS MCGANN,

Petitioners,

v.

JOSEPH IENCO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the doctrine of testimonial immunity shields police officers from liability under 28 U.S.C. § 1983 for falsification of police reports, withholding of exculpatory evidence, and lying to the FBI and prosecutors prior to a criminal defendant's trial.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 9

I. Federal Courts Are in Agreement That Testimonial Immunity Does Not Extend To Extra-Judicial Conduct That Deprives A Criminal Defendant of His Constitutional Rights 9

II. The Seventh Circuit's Decision Does Not Destroy The Doctrine of Witness Immunity 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Alioto v. City of Shively, 835 F.2d 1173 (6th Cir. 1987) 21

Anthony v. Baker, 767 F.2d 657 (10th Cir. 1985) 17, 18

Bailey v. United States, 516 U.S. 137 (1997) 5

Briscoe v. LaHue, 460 U.S. 325 (1983) ..... *passim*

Buckley v. Fitzsimmons, 509 U.S. 259 (1993) .. 10, 11, 20, 21

Burns v. Reed, 500 U.S. 478 (1991) 11

Clark v. United States, 289 U.S. 1 (1933) 8

Enlow v. Tishomingo County, 962 F.2d 501 (5th Cir. 1992) 15

Hafer v. Melo, 502 U.S. 21 (1991) 11

Ienco v. City of Chicago, 148 F.Supp.2d 938 (N.D. Ill. 2001) 9

Ienco v. City of Chicago, 286 F.3d 994 (7th Cir. 2002) 4, 9, 13

Imbler v. Pachtman, 424 U.S. 409 (1976) 10

Jones v. Cannon, 174 F.3d 1271 (11th Cir. 1999) .. 20, 21, 22

Kalina v. Fletcher, 522 U.S. 118 (1997) 10, 11, 12, 20, 23

Keko v. Hingle, 1999 WL 508406 (E.D. La. July 8, 1999) 23

Krohn v. United States, 742 F.2d 24(1st Cir. 1984) ... 12, 24, 25

Kulwicki v. Dawson, 969 F.2d 1454 (3rd Cir. 1992) 12, 23

Malley v. Briggs, 475 U.S. 335 (1986) ..... *passim*

Mastroianni v. Bowers, 160 F.3d 671 (11th Cir. 1998) 15

TABLE OF AUTHORITIES – Continued

Page

McArdle v. Tronetti, 961 F.2d 1083 (3rd Cir. 1992) 21, 22

Moore v. McDonald, 30 F.3d 616 (5th Cir. 1994) 25

Newsome v. McCabe, 256 F.3d 747 (7th Cir. 2001).....9, 26

Pierson v. Ray, 386 U.S. 547 (1967).....10

Spurlock v. Satterfield, 167 F.3d 995 (6th Cir. 1999) 14

Strength v. Hubert, 854 F.2d 421 (11th Cir. 1988).....23

United States v. Ienco, 92 F.3d 564 (7th Cir. 1996) 4, 5

United States v. Ienco, 94 CR 586, 1998 WL 249233 (N.D. Ill. May 11, 1998)..... 7

United States v. Ienco, 182 F.3d 517 (7th Cir. 1999) 7

Wheeler v. Cosden Oil & Chemical Co., 734 F.2d 254 (5th Cir. 1984) 14, 15, 25

White v. Frank, 855 F.2d 956 (2nd Cir. 1988).....16, 17

OTHER AUTHORITIES

Richard Posner, *The Problematics Of Moral And Legal Theory*, 171 (1999).....26

STATEMENT OF THE CASE

A.

Neither *Briscoe v. LaHue*, 460 U.S. 325 (1983), the other precedents of this Court, nor those of any other Circuit support the City of Chicago's unprincipled, attempted expansion of the doctrine of absolute testimonial immunity to pre-testimonial conduct that admittedly violates the constitutional rights of a criminal defendant. Focusing exclusively on the police officers' perjury in this case, the Petition ignores the pervasive and willful extrajudicial police misconduct that occurred prior to the officers' testimony, including their preparation of false police reports, their intentional lies to the FBI and to federal prosecutors, and their deliberate withholding of a critical report and other exculpatory information from the prosecutors and the FBI.

The City's blanket argument that "eight other circuits have rejected the Seventh Circuit's view that a witness's immunity cannot shield pretrial conduct" (Petition at 5) is palpably wrong. The Circuit Courts of Appeals are in perfect unanimity that pre-testimonial misconduct by law enforcement officials does not become retroactively immunized by the expedient of testifying. In short, the "serious disagreement" among the Circuits, posited by the Petition, is non-existent. Moreover, the cases cited by the City do not support the proposition that testimonial immunity extends to misconduct beyond perjurious testimony. Rather, they stand for the proposition that a *conspiracy to commit perjury*, like the perjury itself, is immunized, based on the principle that a person may not be prosecuted for conspiracy to commit an act that he may perform with impunity. As the Seventh Circuit recognized, however, this

case is neither about perjury nor a conspiracy to commit perjury.

Acceptance of the City's arguments would result in an insidious and infinite expansion of the doctrine of absolute immunity by retroactively immunizing all extra-judicial police misconduct, so long as ultimately there is testimony at a hearing or trial that relates to the matters falsified by the police or the exculpatory information withheld by the police. It would thus mean an end to liability for any kind of extra-judicial police misconduct like that involved in this case – conduct that has been unanimously condemned by every court that has considered such behavior.

An additional danger inherent in the City's argument is that it would encourage police lawlessness and police perjury: As things now stand, a police officer who fabricates evidence or withholds exculpatory evidence is liable under § 1983. Under the City's extraordinarily irresponsible theory, that liability would be extinguished by the simple expedient of actually giving perjured testimony, and when faced with a § 1983 suit, the officer need only argue that his extra-judicial misconduct was a component of a perjury conspiracy and is thus immunized along with the perjury, itself. It is difficult to imagine a more socially deleterious policy or one more at odds with the Court's primary concern of protecting the judicial process. *Briscoe*, 460 U.S. at 334.

B.

On August 29, 1994, Joseph Ienco and Gregory Iovine visited Jerome Greenberg at his office in Chicago to discuss a debt Greenberg owed to an associate of Mr. Ienco. The visit became contentious, and Greenberg's

secretary called the police. Mr. Ienco and Iovine left, but returned to Greenberg's office that afternoon to speak with him about the debt. Greenberg observed them on a security camera and called the police. Petitioners, Angarone and McGann of the Chicago Police Department, responded to the following dispatch: "disturbance with two men in a lobby, 2728 North Hamden Court. 2728 Hamden Court. Greenberg is your complainant. You'll find him on the second floor in Apartment 207." As Angarone and McGann arrived at the building, Mr. Ienco and Iovine were leaving. The officers immediately arrested them and forced them into the back seat of the police car, which Ienco and Iovine were unable to leave because the car's doors were locked. After Mr. Iovine and Mr. Ienco were taken to the police station and charged with trespass, the officers found a minivan key in the back seat of their squad car. They returned to Greenberg's office and ultimately found a minivan, which they searched, and discovered a box containing weapons. Mr. Ienco and Mr. Iovine were detained while federal officials were notified.

Officers Angarone and McGann falsified their police reports, claiming that Ienco and Iovine were not arrested and that the encounter had been volitional and friendly. Special Agent Stephen Holland of the FBI was advised by Angarone "as to the facts and circumstances surrounding the arrest of Joseph P. Ienco" and that "as a result of the information provided by the officer," he believed that there existed sufficient evidence to charge Mr. Ienco with various federal crimes. In fact, Angarone, consistent with the falsified police reports, told the Agent that the encounter was friendly, that Iovine and Ienco agreed voluntarily to wait in the car while the police spoke to Greenberg, and that no arrest occurred until much later. Based on the

false information provided by the officers and the seized materials, Mr. Ienco and Mr. Iovine ultimately were charged with having conspired to commit extortion, 18 U.S.C. § 1951, interstate travel in aid of racketeering activity, 18 U.S.C. § 1952, and of having used or carried a firearm during and in relation to a crime of violence. 18 U.S.C. § 924(c)(1).

Mr. Iovine and Mr. Ienco moved to suppress the physical evidence uncovered during the search of the minivan and of their hotel room, claiming that they had been unlawfully arrested and that weapons should be suppressed as fruits of an unconstitutional search and seizure. At the suppression hearing, Angarone claimed he merely asked Iovine and Ienco "whether they would mind remaining while he tried to find out who had called the police. They agreed and he directed them to sit in the back of the police car. They did so, and he shut the door, locking them in. . . . " *United States v. Ienco*, 92 F.3d 564, 566-67 (7th Cir. 1996) ("*Ienco I*").

"Ienco's version of the arrest was different. He testified at the suppression hearing that he and Iovine had been seized by the police the moment they emerged from the building. . . . " *Id.* at 567. At the conclusion of the suppression hearing, the district court denied the motions to suppress based on its belief that Angarone's testimony was "direct, unfeigned, complete, consistent, informed, careful, [and] professional." *Ienco v. City of Chicago*, 286 F.3d 994, 996 (7th Cir. 2002) ("*Ienco III*"). After the unsuccessful suppression motion, Mr. Iovine became a government witness against Mr. Ienco, who was convicted on all charges. Angarone testified at the trial and repeated his perjurious story. The district court sentenced Mr. Ienco to 33 years and five months in jail.

The Court of Appeals for the Seventh Circuit reversed. *Ienco I*, 92 F.3d 564 (7th Cir. 1996). Speaking for a unanimous panel, Chief Judge Posner expressed substantial doubt about the truthfulness of Angarone's story, and concluded that if Ienco were believed, the search "was illegal because according to him the police arrested him before they had spoken to him or Iovine or to Greenberg, and thus before they had probable cause to think that Ienco and Iovine had attempted an illegal entry." *Ienco I*, 92 F.3d at 566. The court held that reversal was required since Mr. Ienco had not been given a fair opportunity to present evidence that supported his rendition of what occurred prior to his being locked in the back seat of the squad car. *Id.* at 565. The court also ordered a new suppression hearing before a new judge and held that if Mr. Ienco prevailed, he would be entitled to a new trial on all counts; if he lost, he would be entitled to a new trial on the gun charge. *Id.* at 569.[1]

In the subsequent suppression hearing before another district judge, Angarone again insisted that Mr. Ienco and Mr. Iovine had voluntarily agreed to stay on the scene in the police car and that they did not seize any identification until almost an hour later when they were taken to the police station. McGann supported this tale. The district court, like Chief Judge Posner, found that it strained

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[1] Reversal was also necessitated by the district court's having given a pre-*Bailey v. United States*, 516 U.S. 137 (1995) jury instruction on the gun possession charges. While the instruction was the law of the circuit at the time of trial, *Bailey* held that it impermissibly allowed for conviction of the charged offense even if the defendants had not "active[ly] employ[ed]" the gun during the alleged offense. *Id.*

credulity rather far to accept this testimony, and thus he concluded:

> According to the two police officers, the two 'suspects' willingly agreed to enter the car. The court finds that the testimony that Ienco and Iovine consented to enter and remain in the police car is not believable. . . . It is improbable that Ienco and Iovine consented to be confined in such a close area for the half-hour or so during which Angarone conducted his investigation. *United States v. Ienco*, 94 CR 586-1, 1997 WL 392188 *7, n.5 (N.D. Ill. July 3, 1997).

Angarone again testified that Mr. Ienco and Mr. Iovine denied having any identification – statements which Angarone claimed he knew to be false and which he claimed aroused his suspicions. Again McGann supported Angarone's story, and the officers' police report prepared the night of the arrest contained the same false claim. Irrefragable evidence in the form of police department computer printouts demonstrated the falsity of the officers' claim. As the district court explained:

> According to Angarone and McGann, Ienco and Iovine told them that they had no identification. The police officers said that although Angarone felt the wallets when he conducted the pat down, he did not have any personal identification about Ienco and Iovine until he asked them for their names, dates of birth, social security numbers, etc. as they were driving back to the police station some thirty-five (35) minutes after they first received the radio dispatch. That would be approximately 6:10 p.m. This testimony is directly contradicted by the NCIC/LEADS printout which shows that at 5:30 p.m. on August 29, 1994, an inquiry was received concerning one Joseph P.

> Ienco from a mobile unit of the Chicago Police Department. At 5:33 p.m. a similar inquiry was received concerning Gregory Iovine. The inquiries concerned the names, social security numbers and dates of birth of Ienco and Iovine. More importantly, Ienco's date of birth was given as October 15, 1993. This was obviously a mistake. Ienco was born on October 17, 1964 but October 15, 1993 happens to be the date of issuance of his driver's license, as set forth on the license itself. As between Ienco making an obvious mistake about his birthday and one of the police officers misreading (and then misreporting) information from the license itself, the latter is the more likely sequence of events. The time of the inquiry also confirms Ienco's recitation of events. The first inquiry was made five minutes after the dispatch was received, not the thirty-five or more attested to by the police officers. This is more than a mere misrecollection since both officers testified to the same highly improbable and significant facts. In short, Angarone and McGann lied. *Id.* at *7, n.7.

The district court ultimately suppressed all the tangible fruits of the seizure and of a subsequent search of their hotel room as well as Mr. Iovine's testimony. *United States v. Ienco*, 94 CR 586, 1998 WL 249233 (N.D. Ill. May 11, 1998). The Seventh Circuit affirmed. *United States v. Ienco*, 182 F.3d 517 (7th Cir. 1999) ("*Ienco II*"). Following the denial of a request for rehearing, the government dismissed the indictment against Mr. Ienco.

Angarone and McGann engaged in substantial pretrial misconduct and withheld exculpatory information about the testimony of other witnesses: Angarone withheld information that McGann was lying to the F.B.I. and

federal prosecutors; McGann withheld information that Angarone was lying to them and to the district court in the suppression hearings and at the trial; McGann and Angarone each withheld information that Mr. Iovine and Mr. Ienco were telling the truth; and the officers withheld information that Mr. Berman lied about the allegedly innocuous nature of the initial encounter between Mr. Ienco and the defendants – testimony which the district court discredited and which tracked Angarone's testimony.[2] As a consequence of the falsification of pre-trial evidence and withholding of exculpatory evidence, "the doom of mere sterility was on the [investigation] from the beginning." *Clark v. United States*, 289 U.S. 1, 11 (1933) (Cardozo, J.).

On June 23, 2001, after serving more than five years in jail, Mr. Ienco commenced the instant action against Angarone, McGann, and the City of Chicago. The complaint charged that the defendants committed the constitutional tort of malicious prosecution under 42 U.S.C. § 1983 (Count I) and the Illinois tort of malicious prosecution (Count II). The complaint and accompanying exhibits described the defendant police officers' initial constitutional violations and their subsequent lies and falsifications to federal officials.

On October 20, 2000, the City moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). On October 31, 2000, the defendant police officers answered the

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[2] Thus, this is not, as the Petition contends, merely a case where the withheld information is based on the witness, himself providing false testimony.

complaint. The officers continued to insist they had done nothing wrong, although finally, in this Court there is at least the acknowledgment that their conduct was "reprehensible." (Petition at 12) On December 19, 2000, the City's motion was denied. Also on this date, Angarone and McGann filed their motion for summary judgment. On May 2, 2001, the district court granted the individual defendants' motion for summary judgment and dismissed Mr. Ienco's claims against the City, which the court concluded automatically fell in light of the dismissal of the claims against the officers. *Ienco v. City of Chicago*, 148 F.Supp.2d 938 (N.D. Ill. 2001).

On April 12, 2002, the Seventh Circuit reversed summary judgment as to Officers Angarone and McGann, *Ienco v. City of Chicago*, 286 F.3d 994 (7th Cir. 2002) ("*Ienco III*"), based on the court's intervening decision in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001). A petition for rehearing en banc was denied on June 20, 2002, as was a request to stay the mandate. Thereafter, the City timely filed the instant Petition on behalf of the Officers.

REASONS FOR DENYING THE WRIT

I.

Federal Courts Are in Agreement That Testimonial Immunity Does Not Extend To Extra-Judicial Conduct That Deprives A Criminal Defendant of His Constitutional Rights

This Court has interpreted § 1983 to give absolute immunity to functions "intimately associated with the *judicial* phase of the criminal process." *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (emphasis in original). Thus,

state judges are absolutely immune from liability for their judicial acts, *Pierson v. Ray*, 386 U.S. 547 (1967), and a prosecutor "who acted within the scope of his duties in initiating and pursuing a criminal prosecution" is not amenable to suit under § 1983. *Imbler v. Pachtman*, 424 U.S. 409, 410 (1976). Likewise, absolute immunity extends to "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). Witnesses also enjoy absolute immunity from civil liability for their testimony provided in judicial proceedings. *Briscoe v. LaHue*, 460 U.S. 325 (1983).

The rationale behind granting absolute immunity to judges, prosecutors, and witnesses in connection with the performance of functions "intimately associated" with the judicial process "is based on the policy of protecting the judicial process [itself]." *Id.* at 334 (citing *Imbler*, 424 U.S. at 439, White, J., concurring):

> The ability of courts, under carefully developed procedures, to separate truth from falsity, and the importance of accurately resolving factual disputes in criminal (and civil) cases are such that those involved in judicial proceedings should be given every encouragement to make a full disclosure of all pertinent information within their knowledge. *Id.*

Thus, absolute immunity is intended to protect judges and prosecutors from the threat of harassing litigation and to encourage witnesses with pertinent information to avoid self-censorship and testify openly and honestly without the fear of subsequent liability. *Kalina v. Fletcher*, 522 U.S. 118, 124-29 (1997). Therefore, in defining the

contours of absolute immunity, the central focus of this Court has been "the nature of the judicial proceeding itself." *Briscoe*, 460 U.S. at 334.

At the same time, this Court has been "quite sparing in its recognition of absolute immunity, and has refused to extend it any further than its justification would warrant." *Burns v. Reed*, 500 U.S. 478, 487 (1991). As a result, "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Id.* Thus, a prosecutor has only qualified immunity when performing a function that is not associated with his role as an advocate for the state. *Buckley*, 509 U.S. at 269-70. Prosecutors similarly do not enjoy absolute immunity for giving certain legal advice to police officers during an investigation, *Burns*, 500 U.S. at 496, for allegedly fabricating evidence concerning an unsolved crime, *Buckley*, 509 U.S. at 276-78, or for knowingly making false statements of fact in an affidavit supporting an application for an arrest warrant. *Kalina v. Fletcher*, 522 U.S. 118 (1997). Likewise, police officers do not enjoy absolute immunity for submitting false affidavits in their applications for arrest warrants. *Malley*, 475 U.S. 342-43. Therefore, in determining questions of immunity, courts must look "to the nature of the function performed, not the identity of the actor who performed it." *Buckley*, 509 U.S. at 269; *Kalina*, 522 U.S. at 127. Moreover, "officials seeking absolute immunity must show that such immunity is justified for the governmental function at issue." *Hafer v. Melo*, 502 U.S. 21 (1991).

In *Malley*, this Court rejected a police officer's arguments that he was entitled to absolute immunity for causing the plaintiffs to be unconstitutionally arrested by presenting a judge with a complaint and affidavit in

support of an arrest warrant which failed to establish probable cause. The Court held that the police officer's "function" in the case was similar to that of a complaining witness, which was not entitled to absolute immunity at common law, and, further, that the police officer's submitting an affidavit seeking an arrest warrant, "though a vital part of the administration of criminal justice," was too far removed from the *judicial* phase of criminal proceedings to be entitled to absolute immunity. 475 U.S. at 342-43. (Emphasis supplied).

Similarly, this Court in *Kalina* held that a prosecutor's conduct in making false statements in an affidavit offered in support of a request for an arrest warrant was analogous to a police officer or other competent witness in swearing to facts to support a finding of probable cause, and therefore, he was not entitled to absolute immunity. 522 U.S at 129-30. *Cf. Kulwicki v. Dawson*, 969 F.2d 1454 (3rd Cir. 1992) (Prosecutor accused of manufacturing false evidence after he had stopped working on case not entitled to immunity because conduct fell outside his quasi-judicial function as prosecutor.) Even in *Briscoe*, this Court recognized that the doctrine of absolute immunity is not without limits, and expressly left open the issue of whether immunity extends to a police officer's false testimony at a probable cause hearing. 460 U.S. at 328 n.5. *Cf. Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984) ("The witness immunity discussed in *Briscoe* is afforded to encourage complete disclosure in judicial proceedings as a means for ascertaining the truth, and, because of its common law roots, is necessarily limited to witnesses in judge-supervised trials.")

Here, the Seventh Circuit held that the doctrine of absolute testimonial immunity did not bar Mr. Ienco's

claims that Officers Angarone and McGann withheld exculpatory information and lied to the federal prosecutors who indicted him. *Ienco v. City of Chicago*, 286 F.3d 994 (7th Cir. 2002). In the court's view, "[n]either the withholding of exculpatory information nor the initiation of constitutionally infirm criminal proceedings is protected by absolute immunity." *Id.* Contrary to the City's mischaracterization, the Seventh Circuit's decision explicitly recognized that perjured testimony *is* immunized, and that "[i]f Ienco were merely claiming damages based on the officers' perjured testimony, the officers would be entitled to absolute immunity." *Ienco III*, 286 F.3d at 1000.

Ienco's claims, however, "are not based on the officers' perjured testimony." Rather, as the court emphasized, they are based on the police officers' false reports, lies to federal officials, and withholding of exculpatory evidence. *Id.* This conduct has never enjoyed absolute immunity under § 1983, and extending the doctrine of testimonial immunity to such conduct would only embolden police officers to disregard the constitution, knowing that any liability for their conduct would be immunized by the simple expedient of testifying in a judicial proceeding. This would encourage rather than deter illegal conduct.

The City's blanket argument that "eight other circuits have rejected the Seventh Circuit's view that a witness's immunity cannot shield pretrial conduct" (Petition at 5) is wrong. First, the Seventh Circuit expressly held that the Petitioners would be entitled to absolute immunity if Ienco's claims were based solely on their pre-trial perjury. *Id.* Second, other circuits share the Seventh Circuit's view that police officers do not enjoy absolute testimonial immunity for pre-trial conduct, and that such conduct is

not retroactively immunized by subsequent perjurious testimony.

For example, in *Spurlock v. Satterfield*, 167 F.3d 995 (6th Cir. 1999), the Sixth Circuit held that although a deputy sheriff was absolutely immune from suit for his testimony during the plaintiff's criminal trial, he was not entitled to absolute testimonial immunity for his alleged non-testimonial conduct that ultimately led to witness testimony, including fabricating probable cause, manufacturing false evidence, and coercing a witness. In rejecting the very argument that the City raises in the Petition – that the defendant should be entitled to absolute immunity because the alleged manufacturing of false evidence and later presenting that evidence in the form of testimony are "inextricably linked" – the court of appeals held that such reasoning would allow police officers who fabricate evidence or manufacture probable cause to shield themselves from liability simply by later providing false testimony regarding that evidence:

> The doctrine of absolute immunity for testimony is a shield to ensure that those individuals intimately involved in the judicial process are able to carry out their responsibilities without the constant threat of vexatious lawsuits, not a sword allowing them to trample the statutory and constitutional rights of others. *Id.* at 1003-04.

Similarly, in *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254 (5th Cir. 1984), *modified on other grounds*, 744 F.2d 1131, the Fifth Circuit held that a state investigator, who knowingly gave false testimony at a probable cause hearing, was not entitled to absolute immunity:

> If, then, the Fourteenth Amendment imposes a duty on state prosecutors to charge only upon

> ascertaining probable cause, it follows that one acting under color of state authority, as [the defendant] was alleged to have been, can be liable for subverting the performance of that duty, as by maliciously tendering false information to the prosecutor which leads him to believe probable cause exists where there is none. *Id.* at 260.

The court further held that the plaintiffs had been deprived of their right to a determination of probable cause before arrest or detention because "the information which formed the basis of their arrest and detention was supplied by the [defendant] with the knowledge it was false." *Id.*

The court rejected the defendant's argument that he was entitled to absolute immunity under *Briscoe* because the plaintiffs' claims were premised on his testimony at the probable cause hearing: "*Briscoe* does not create immunity where none existed before; it merely rejects the notion that § 1983 abolishes for police officers that testimonial immunity which exists at common law." *Id.* at 261. Thus, the court held that *Briscoe* did not afford immunity from suit for knowingly false testimony submitted at probable cause determinations. *Id. Accord, Mastroianni v. Bowers*, 160 F.3d 671, 678 (11th Cir. 1998), *vacated on other grounds*, 173 F.3d 1363 (11th Cir. 1999) (Although police officer was entitled to absolute immunity for grand jury testimony, "that immunity cannot extend backwards to protect him from his alleged involvement in conspiring to violate [plaintiff's] constitutional rights."); *Enlow v. Tishomingo County*, 962 F.2d 501 (5th Cir. 1992) (Summary judgment properly denied where disputed questions remained regarding police investigator's role in actively instigating, encouraging, and/or perpetuating Plaintiffs'

prosecution, and other events prior to his grand jury testimony. Sufficient evidence exists that defendant's actions, including his grand jury testimony, were taken in retaliation for plaintiffs exercising their constitutionally protected freedoms).

Moreover, several courts addressing the issue left unresolved in *Briscoe* have held that the doctrine of testimonial immunity does *not* extend to *testimony* in pre-trial proceedings, including grand jury and probable cause hearings, if the defendant was a "complaining witness," who played a role in initiating the prosecution. For example, in *White v. Frank*, 855 F.2d 956 (2nd Cir. 1988), the Second Circuit, relying on *Malley,* held that a police officer who intentionally gave false testimony before a grand jury which led to the initiation of a baseless prosecution was not entitled to absolute immunity from civil liability under § 1983. After discussing the common law distinction between lay witnesses, who generally enjoyed absolute immunity for their testimony if relevant to a judicial proceeding, and a complaining witness, who did not enjoy such absolute immunity, the court noted that the doctrine of absolute immunity applied only where liability is asserted solely because of a police officer's false *testimony* at a judicial proceeding. *Id.* at 960-61 (citing cases). Thus, the court held that the defendant police officers could not use their grand jury testimony as a shield for their illegal pre-testimonial conduct:

> Where, however, the constitutional tort is the action of the police officer in initiating a baseless prosecution, his role as a "complaining witness" renders him liable to the victim under section 1983, just as it did at common law, and the fact that his testimony at a judicial proceeding may

> have been the means by which he initiated the prosecution does not permit him to transpose the immunity available for defamation as a defense to malicious prosecution. *Id.* at 961.

The court further rejected the police officers' argument that the role of both the public prosecutor and the grand jury in advancing the prosecution of the plaintiff necessarily insulated them from liability for malicious prosecution.

> The intervening acts of a grand jury have never been enough to defeat an otherwise viable malicious prosecution claim. . . . And though an indictment by a grand jury is generally considered prima facie evidence of probable cause in a subsequent civil action for malicious prosecution, this presumption may be rebutted by proof that the defendant misrepresented, withheld, or falsified evidence.

Id. at 961-62. Nor did the prosecutor's role affect the court's immunity analysis. "As with the grand jury, however, the public prosecutor's role in a criminal prosecution will not necessarily shield a complaining witness from subsequent civil liability where the witness's testimony is knowingly and maliciously false." *Id.* at 962.

In *Anthony v. Baker*, 767 F.2d 657 (10th Cir. 1985), the Tenth Circuit held that state and federal law enforcement officers could be liable under § 1983 "when they conspire to procure groundless state indictments and charges based upon fabricated evidence or false, distorted, perjurious testimony presented to official bodies in order to maliciously bring about a citizen's trial or conviction." *Id.* at 662. The court of appeals agreed with the district court that the complaint could not be dismissed under the testimonial immunity doctrine "because it alleged other

facts which fell outside the scope of immunity defined [in *Briscoe*]," and held that *Briscoe* did not afford absolute immunity for the testimony of the defendants before the grand jury. *Id.* at 663.[3]

Not a single case cited by the City addresses the applicability of testimonial immunity to misconduct by a police officer followed by the officer's testimony in a trial or adversarial pre-trial proceeding. Rather, the City's authorities stand for the unremarkable proposition that the doctrine of testimonial immunity bars § 1983 suits against parties testifying in quasi-judicial capacities,[4] and that a *conspiracy to commit perjury*, like the perjury itself, is immunized, on the principle that a person may not be

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[3] In a subsequent decision, *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992) (*Anthony v. Baker II*), the Court held that its earlier decision decided only that the district court erred in granting the defendant absolute immunity for his entire grand jury testimony. The court concluded that the defendant should be denied absolute immunity for his testimony at the grand jury and a preliminary hearing if he is found to be a complaining witness whose testimony was relevant to the manner in which he initiated or perpetuated the prosecution of the plaintiff. *Id.* at 1401. Thus, the Tenth Circuit not only distinguished between a defendant's pre-testimonial conduct and his testimony before a grand jury. It also distinguished between whether the defendant testified before the grand jury as a lay witness or a complaining witness.

[4] *Moses v. Parwatikar*, 813 F.2d 891 (8th Cir. 1987) (Allegation of conspiracy will not abrogate absolute immunity afforded court-appointed psychiatrist in performance of quasi-judicial functions, which consisted of examining defendant's competency and reporting findings to the court); *Watterson v. Page*, 987 F.2d 1 (1st Cir.) (Court-appointed psychologist involved in state's child abuse investigation entitled to absolute immunity for testimony in the course of judicial proceedings).

prosecuted for conspiracy to commit an act that he may perform with impunity.[5]

Thus, the City sedulously seeks to blur the important analytical distinction between police perjury, which is not actionable, and the falsification of reports and withholding of exculpatory information, which most assuredly are subject to liability under § 1983. The Petition's implicit invocation of the general principle that all acts performed as part of an alleged *conspiracy to commit perjury* are entitled to absolute immunity is thus invocation of a principle not relevant to this case. Neither *Briscoe* nor any other decision of this Court pretends to hold that merely because police officers ultimately perjure themselves, every antecedent act of misconduct is retroactively immunized.[6]

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[5] *See e.g., Miller v. Glanz*, 948 F.2d 1562, 1570 (10th Cir. 1991) (Conspiracy to present false testimony at trial), in which the court also noted that the First and Second Circuits have held that the absolute immunity allowed in *Briscoe* should not extend to conspiracies to present false testimony, citing *Malachowski v. City of Keene*, 787 F.2d 704 (1st Cir.), *cert. denied*, 479 U.S. 828 (1986) and *San Filippo v. U.S. Trust Co. of New York, Inc.*, 737 F.2d 246 (2nd Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985); *Hunt v. Bennett*, 17 F.3d 1263 (10th Cir. 1994) (Prosecutorial immunity not waived by allegation of conspiracy to commit perjury with non-immune parties); *Mowbray v. Cameron County*, 274 F.3d 269 (5th Cir. 2001) (Conspiracy to commit perjury); *Franklin v. Terr*, 201 F.3d 1098 (9th Cir. 2000) (Plaintiff could not circumvent psychiatrist's absolute immunity for testimony given at criminal trial by alleging conspiracy to present false testimony).

[6] Indeed, the City concedes that the officers' underlying search and seizure of Ienco and his effects would be actionable under § 1983 as a violation of the Fourth Amendment, and that the officers would lack testimonial immunity on such a claim, "since the doctrine does not reach nontestimonial conduct." (Petition at 13 n. 9).

In fact, several of the cases cited by the Petition expressly held that testimonial immunity did *not* immunize a defendant's pre-testimonial conduct, even though it was followed by perjurious testimony. For example, in *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999) (Petition at 8), the Eleventh Circuit held that a detective was not entitled to either absolute or qualified immunity for his allegedly false sworn statements contained in an arrest affidavit presented at the plaintiff's probable cause hearing. The court held that even though the affidavit was submitted in a judicial proceeding, the detective's "function" and "conduct" were similar to that of the police officer in *Malley*, and the prosecutor in *Kalina*, where this Court held that there was no absolute immunity. *Id.* at 1284-85. As a result, the court concluded that the detective was not entitled to absolute immunity, particularly because his statements "were the sole basis asserted for probable cause in the arrest affidavit." *Id.* at 1285.

The court also rejected the very argument that the Petition seeks to advance here: that pre-testimonial misconduct becomes retroactively immunized by subsequent testimony at a judicial proceeding. In *Jones*, the defendants argued that their alleged investigative misconduct, including a fabricated confession and the planting of a boot print, only became actionable if used as evidence to convict the plaintiff. The detectives argued that because a constitutional violation only occurs if they use the allegedly fabricated evidence by testifying about it to a grand jury or judge, they should be entitled to testimonial immunity for all the pre-indictment conduct at issue. Relying on *Buckley*, in which this Court rejected a similar argument that a prosecutor's later use before a grand jury of evidence produced from the prosecutor's investigative work was entitled to absolute immunity, the court held that the detectives could not "cloak their misconduct

during an investigation in absolute immunity merely by presenting the fabricated evidence or testifying about it in a grand jury hearing or trial." *Id.* at 1290 (citing *Buckley*, 509 U.S. at 275-76). "The focus must be on the nature of the actions performed at the time they are performed." *Id.* *Accord*, *Buckley v. Fitzsimmons*, 20 F.3d 789, 797 (7th Cir. 1994) ("[C]onstitutional wrongs completed out of court are actionable even if they lead to immunized acts. Immunity for prosecutorial deeds does not whitewash wrongs completed during the investigation.")

Similarly, in *McArdle v. Tronetti*, 961 F.2d 1083 (3rd Cir. 1992) (Petition at 8), the Third Circuit held that although a prison counselor and physician were immune from § 1983 liability with respect to claims for false diagnosis, false testimony, and conspiracy, they were not protected by either witness or judicial immunity regarding allegations that they were responsible for filing a petition for involuntary commitment that they knew contained lies. In distinguishing between the defendants' conduct for immunity purposes, the court found that the false diagnosis and testimony claims concerned the defendants' functions as witnesses and officers acting at the court's direction. When the defendant filed the involuntary commitment petition, however, "he was functioning neither as a witness or as an arm of a court; the petition was not the equivalent of testimony offered in court or a written report offered at the court's direction." *Id.* *See also* *Alioto v. City of Shively*, 835 F.2d 1173, 1174 (6th Cir. 1987) (Petition at 8) (Absolute witness immunity for conspiring to give false testimony before grand jury shields only those witnesses who actually testified in a judicial proceeding; "[the] doctrine does not shield from liability alleged conspiracies to falsify non-testimonial evidence").

Acceptance of the City's arguments would thus result in an insidious and infinite expansion of the doctrine of absolute immunity by retroactively immunizing all extra-judicial police misconduct, so long as ultimately there is testimony at a hearing or trial that relates to the matters falsified by the police or the exculpatory information withheld by the police. Moreover, the City's argument would encourage police lawlessness and police perjury, because a police officer who fabricates evidence or withholds exculpatory evidence could extinguish any liability under § 1983 by the simple expedient of actually giving perjured testimony. It is difficult to imagine a more socially deleterious policy.

II.

The Seventh Circuit's Decision Does Not Destroy The Doctrine of Witness Immunity

The Seventh Circuit's holding neither "effectively destroys the doctrine of witness immunity" (Petition at 5), nor "exposes law enforcement officials to the precise burdens of litigation from which this Court decreed they should be spared in *Briscoe*." (Petition at 15). As a threshold matter, the City's claim is belied by the fact that in a number of cases, including several of its own authorities,[7]

[7] *See e.g. McArdle v. Tronetti, supra,* 961 F.2d 1083 (3rd Cir. 1992) (Although prison counselor and physician were immune from § 1983 liability with respect to claims for false diagnosis, false testimony, and conspiracy, they were not entitled to witness or judicial immunity on claims of filing a petition for involuntary commitment which they knew contained lies); *Jones v. Cannon, supra,* 174 F.3d 1271, 1286 (11th Cir. 1999) (Although detective enjoyed absolute immunity for allegedly false testimony before the grand jury, during pre-trial deposition and at the

(Continued on following page)

courts have held simultaneously that while absolute immunity would apply to a defendant's actual testimony, it would not extend to pre-testimonial misconduct. For example, in *Kalina v. Fletcher*, 522 U.S. 118 (1997), this Court held that although a prosecutor's conduct in connection with the preparation and filing of charging documents was entitled to absolute immunity, the prosecutor was not entitled to absolute immunity in connection with making allegedly false statements in an affidavit supporting his application for an arrest warrant.

Similarly, in *Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988), the Eleventh Circuit held that although an investigator for the Alabama Attorney General's Office was entitled to absolute immunity from liability under § 1983 for his grand jury testimony, the immunity did not extend to the investigator's "pre-testimonial acts" in furtherance of an alleged conspiracy to cause the plaintiffs' wrongful indictment and prosecution. According to the Court, "any of the pretestimonial acts that might have undermined the federally guaranteed right to be free of malicious prosecution can form the basis of a § 1983 action." *Id.* at 426. *Accord*, *Kulwicki v. Dawson*, 969 F.2d 1454 (3rd Cir. 1992) (District attorney was entitled to absolute prosecutorial immunity for initiating criminal charges against plaintiff, but not entitled to absolute immunity for witness interviews conducted prior to filing charges and communicating with press); *Keko v. Hingle*, 1999 WL 508406 (E.D. La. July 8, 1999) (Expert witness entitled to absolute immunity for actual testimony during court proceedings, but not

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plaintiff's criminal trial, immunity did not extend to false statements contained in an arrest affidavit presented at the plaintiff's probable cause hearing).

for his alleged role in obtaining arrest warrant and malicious prosecution of plaintiff).

Moreover, courts have had no difficulty distinguishing between conduct and testimony that are integral parts of the judicial process, and, therefore, entitled to absolute immunity on the one hand, and extra-judicial conduct or functions on the other, which only entitle the defendant to qualified immunity. For example, in *Malley*, this Court rejected the argument that policy considerations require absolute immunity for a police officer applying for a warrant:

> As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law. That is, a police officer will be entitled to qualified immunity unless, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue. 475 U.S. at 341.[8]

Similarly, in *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984), the First Circuit extended absolute immunity to a federal prosecutor in connection with his conduct while gathering evidence for the plaintiff's prior criminal prosecution. At the same time, however, the court held

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[8] Here, the Seventh Circuit remanded the case to the district court to determine whether the police enjoyed qualified immunity. On remand, the district court will thus be required to determine whether there was a deliberate withholding of evidence designed to misdirect or mislead the prosecutors or the defense as opposed to a mere failure to take the initiative in providing information to them that would have come out as soon as either the defense or the prosecutors asked the police officers for the information.

that an FBI agent was not entitled to absolute immunity under *Briscoe* for his alleged misrepresentations in an affidavit submitted in support of the warrant for the plaintiff's arrest. According to the court, because the process of swearing out a warrant affidavit lacks any of the procedural safeguards of a judicial proceeding designed to ascertain the truth, "we think it desirable that officers should, in effect, be required to think twice about allegations in warrant affidavits." *Id.* at 31. *Cf. Malley* at 343 ("In the case of an officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity."). The *Krohn* court further held that because police officers, who are less critical to the judicial process than prosecutors, "are not acting in their quasi-judicial capacity when they act as investigators . . . activities such as requesting a warrant [are] not judicial, but administrative, and that absolute immunity does not apply. *Id.* at 31.[9]

While the costs of judgments entered against police officers for misconduct *are* passed along to the taxpaying public (Petition at 16 n. 10), it could not be otherwise, and that is as it should be. All costs incurred by the City in its operations are shifted to the taxpayers. But that is not a reason to immunize police misconduct beyond the narrow boundaries required by the perceived necessity and "balance of harms" that brought the rule of absolute

[9] While the Fifth Circuit has held that *Briscoe* did not afford absolute immunity to police officers who perjured themselves at a pre-trial probable cause hearing, *Wheeler, supra*, the court also ruled that absolute immunity *does* apply to an officer's testimony at an adversarial pre-trial suppression hearing. *Moore v. McDonald*, 30 F.3d 616 (5th Cir. 1994).

immunity into being. Richard Posner, *The Problematics Of Moral And Legal Theory*, 171 (1999). If "liability is the beginning of responsibility," as Dewey taught, City officials faced with the prospect of judgments for police misconduct will act to eliminate the conditions that allow such awards. If they do not, and the costs become sufficiently great, the electorate will take appropriate action. That is the essence of a responsible democracy.[10]

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[10] The Petition's *ipse dixit* that police will be chilled in their efforts is especially unconvincing. All that will be deterred is falsification of reports and withholding of evidence. Section 1983 liability exists precisely to chill such misconduct. *Newsome*, 256 F.3d at 752 ("Requiring culpable officers to pay damages to the victims of their actions holds out promise of both deterring and remediating violations of the Constitution.").